

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ALLSTATE INSURANCE COMPANY,

Civil No. 07-596-AA
OPINION AND ORDER

Plaintiff,

vs.

BRYSON LIBERTY and SHARON
LIBERTY, husband and wife, and
FARLEY, PIAZZA and ASSOCIATES,
Conservator for B.V.H., a minor,

Defendants.

Douglas F. Foley
Katie D. Buxman
Foley & Buxman, PLLC
13115 N.E. 4th Street, Suite 260
Vancouver, Washington 98684
Attorneys for plaintiff

Richard J. Vangelisti
Vangelisti Kocher LLP
9755 SW Barnes Road, Suite 450
Portland, Oregon 97225
Attorney for defendant Farley, Piazza and Associates

Eugene H. Buckle
Robert E. Sabido

Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, Oregon 97205
Attorneys for defendant Sharon Liberty

AIKEN, Judge:

Defendant Sharon Liberty filed a motion to dismiss/abstain from exercising jurisdiction. Defendant's motion to dismiss is granted and this case is dismissed.

BACKGROUND

_____This is a federal declaratory judgment action involving a dispute between plaintiff Allstate Insurance Company ("Allstate") and its insureds (defendants Bryson Liberty and Sharon Liberty), over whether there is coverage for the claims asserted against the insured in an action pending in Multnomah County Circuit Court. See Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a). Defendant Farley, Piazza and Associates ("Farley") filed the state action on behalf of B.V.H., a minor, against defendants Bryson Liberty and Sharon Liberty. Allstate issued insurance policies to the Libertys, however, contends that those policies do not cover the claims against the Libertys in the state action.

Defendant Sharon Liberty moves the court to abstain from exercising jurisdiction over this declaratory judgment action, and to dismiss the action for further proceedings in state court. Defendant Farley takes no position on this motion, see doc. 22, while plaintiff Allstate opposes the motion.

STANDARDS

Under Fed. R. Civ. P. 12(b)(6), once a claim has been stated adequately, it may be supported by "showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 1960 (2007). See also, Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). For the purpose of the motion to dismiss, the complaint is liberally construed in favor of the plaintiffs, and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

In deciding whether to exercise its discretion under the Act, or to abstain from doing so, a federal court must consider three factors: (1) avoiding the needless determination of state law issues; (2) discouraging litigants from forum shopping; and (3) avoiding duplicative litigation. Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc) (citing Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942)). The court is mindful of the Ninth Circuit's admonition that, "[o]rdinarily, federal courts should abstain from exercising their jurisdiction in a declaratory judgment action over disputes between insurance companies and their insureds in which the merits must be decided under state law." Polido v. State Farm Mut. Auto. Ins. Co., 110 F.3d 1418, 1424 (9th Cir. 1997) (citing

Brillhart, 316 U.S. at 495, overruled on other grounds, Dizol, 133 F.3d 1220 (1998)). Moreover, "[i]f there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court." Dizol, 133 F.3d at 1225. Finally, the Brillhart factors are not exhaustive but "remain the philosophic touchstone for the district court." Id. Dizol noted "other considerations" that may be relevant: "whether the declaratory action will settle all aspects of the controversy; . . . will serve a useful purpose in clarifying the legal relations at issue; . . . is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage; . . . will result in entanglement between federal and state court systems;" and the "convenience of the parties, and the availability and relative convenience of other remedies." Dizol, 133 F.3d at 1225 n.5 (citation and internal quotations omitted).

Plaintiff here disputes the existence of coverage under the policies it issued to its insured, the defendants. It is significant that the merits of this dispute must be decided under state law, specifically using Oregon's rules for insurance contract construction. See Hoffman Construction Co. v. Fred S. James & Co., 313 Or 464, 469, 836 P.2d 703 (1992). Similarly, determining an insurer's duty to defend and to indemnify under an

insurance contract is also a matter of state law. Marleau v. Truck Ins. Exchange, 333 Or. 82, 91, 37 P.2d 148 (2001). As noted above, federal courts generally abstain from exercising jurisdiction in a declaratory judgment action where the dispute is between an insurance company and its insured and the merits must be decided under state law. Polido, 110 F.3d at 1424.

Plaintiff here could have filed this action in Multnomah County Circuit Court, where the underlying tort action was already pending. Moreover, the state action involves the same parties as the action at bar. Additionally, the state action involves the nature and scope of the acts allegedly committed by the insureds, defendants here, and the same issues will be decided in the action at bar to determine plaintiff Allstate's duty to indemnify the defendants. Specifically, the court must decide whether certain policy provisions apply, such as, the "intentionally acts" and "criminal acts" exclusions.

Regarding Dizol's "other considerations," it is notable that this action will not resolve the state action and therefore will not settle all aspects of the controversy. There is also some evidence that resolving this action may result in entanglement between federal and state court systems because those courts have disagreed on whether Oregon law allows an insurer to consider extrinsic evidence in determining duty to defend. Compare Travelers Property Cas. Co. of America v. Martella, 2004 WL

1375283 (D. Or. 2004) (consideration of extrinsic evidence is prohibited), with United Pacific Ins. Co. v. Mutual of Enumclaw Ins. Co., 93 Or. App. 69, 71-72, 761 P.2d 4 (1988) (rev. denied, 307 Or. 303, 767 P.2d 443 (1989)) (extrinsic evidence may be allowed). Finally, a declaratory judgment action in Multnomah County Circuit Court is an available remedy and would be equally convenient to the parties.

In sum, upon review of the three Brillhart factors as well as other considerations mentioned in Dizol, I find that these factors weigh in favor of abstention.

CONCLUSION

Defendant Sharon Liberty's motion to dismiss/abstain (doc. 16) is granted and this case is dismissed. Defendant's request for telephonic oral argument is denied as unnecessary.

IT IS SO ORDERED.

Dated this 17 day of November 2007.

/s/Ann Aiken
Ann Aiken
United States District Judge

